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No. 06-961 CAPITAL CASE

Supreme Court of the United States

MARC HOUK, WARDEN,
Petitioner

v.

RICHARD JOSEPH,
Respondent

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

(Capital Case)

I. In granting habeas corpus relief, did the Sixth Circuit misapply settled rules that limit its role and authority and erroneously set aside reasonable state-court determinations of fact?

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STATEMENT OF THE CASE

Respondent Richard Joseph ("Joseph") incorporates by reference the statement of facts and procedural background in part I of the opinion below, as well as the recitation of facts found at the beginning of part III of that opinion. *Joseph v. Coyle*, 469 F.3d 441, 445-49, 450-53 (6th Cir. 2006), Apx. at 3a-9a, 13a-19a.

In that opinion, the Sixth Circuit affirmed the district court's grant of the writ of habeas corpus. The Warden now files this petition for a writ of certiorari. For the reasons that follow, this Court should deny the petition.

REASONS FOR DENYING THE WRIT

The Warden's petition for a writ of certiorari fails to identify any compelling reason for this Court to grant the writ. The Warden does not identify any important federal question in need of resolution by this Court. Nor does the Warden claim there is any conflict – important or otherwise – between this case and any decision of any other United States court of appeals. To the contrary, as stated in his question presented, the Warden claims that "the Sixth Circuit misapplied settled rules . . . and erroneously set aside reasonable state-court determinations of fact." Petition at i. As stated in Supreme Court Rule 12, this Court "rarely" grants certiorari for such reasons.

This is not the appropriate case to grant a petition for writ of certiorari on such a basis. The Warden tries to dress up his issues in terms of a federal court exceeding its authority, but the Warden cannot even show that this case was wrongly decided, much less an abuse of authority. Richard Joseph was tried on the mistaken belief that he could be sentenced to

death regardless of whether the State proved that he actually killed the victim. The result is that Richard Joseph was sentenced to death for a charge never made, tried, or proven. Four federal judges to review this case all agreed that under clearly established federal law this death sentence cannot stand. It is remarkable that the State is still trying to reinstate a death sentence unconstitutionally wrought from its own errors.

A. THE SIXTH CIRCUIT RIGHTLY HELD THE EVIDENCE WAS INSUFFICIENT TO PROVE JOSEPH WAS THE PRINCIPAL OFFENDER.

The Warden argues that the Sixth Circuit erred in granting relief for insufficiency of the evidence. Petition at 9. The Warden does not contend that there is any question of federal law that requires this Court's resolution. Instead, the Warden claims that the Sixth Circuit misconstrued Ohio law to require specific proof that Joseph actually killed the victim. This argument does not provide a reason for this Court to grant certiorari.

The Warden tries to inflate the issue into a claim that a federal court exceeded its authority. This is not the case. The Due Process Clause of the United States Constitution "forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225, 228-29 (2001); *accord, Jackson v. Virginia*, 443 U.S. 307, 309 (1979); *In re Winship*, 397 U.S. 358 (1970). Under clearly established Supreme Court precedent, a federal court presented with a Due Process sufficiency of the evidence claim must determine whether "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. at 319. This is what the Sixth Circuit did. The Warden does not contend that the Sixth Circuit misstated the *Jackson* standard of review or otherwise misconstrued federal constitutional requirements. The Warden's real complaint is that the Sixth Circuit misconstrued the elements of the offense under State law. *See* Petition at 12 ("the elements of a criminal offense...remain a question of state law"). This argument not only fails to provide a basis why this Court should grant certiorari, it is simply incorrect.

Unlike *Bradshaw v. Richey*, 546 U.S. 74 (2005), which the Warden cites, the Sixth Circuit in this case correctly interpreted and faithfully applied Ohio law in deciding this case. The Ohio principal offender specification that ultimately went to the jury requires proof that the defendant was "the actual killer." *See Mitchell v. Esparza*, 540 U.S. 12, 18 (2003); *State v. Penix*, 32 Ohio St. 3d 369, 513 N.E. 2d 744, 746 (1987). Ohio courts have interpreted the "actual killer" to mean that the defendant "personally performed every act constituting the offense of aggravated murder." *State v. Sneed*, 63 Ohio St. 3d 3, 584 N.E. 2d 1160, 1168 (1992); *see also*, *Joseph v. Coyle*, 469 F.3d 441, 454 (6th Cir. 2006) (for state cases cited therein), Apx. at 20a-21a.

Accordingly, to convict Richard Joseph of the death penalty specification, the State needed to prove beyond a reasonable doubt that Richard Joseph actually killed the victim. This the State did not do, much less understand. As the Sixth Circuit rightly notes, the State conceded in its closing argument that it did not know who actually killed the victim: "The State of Ohio can't tell you. I wish I could. I wish I could tell you exactly what happened. I don't know who struck the death blow." 11 J.A. at 3907 (Trial Tr. at 1976). Consistent with the State's repeated admissions that it

did not know, much less could prove, who actually killed the victim, the State did not offer any such proof. The Warden once again provides a list of circumstantial evidence relevant to liability for aggravated murder in general, but none of this evidence goes to prove the principal offender specification, that is, that Joseph was the actual killer. We are left, as the prosecutors repeatedly admitted at trial, without knowledge as to who actually killed the victim.

The Warden no longer strenuously argues that any of the evidence cited proves Joseph actually killed the victim. Instead, the Warden argues that there is no support in Ohio case law for the Sixth Circuit's conclusion that "when the defendant and a coconspirator are present at the time and place of the murder, there must be evidence that the defendant struck the fatal blow(s)." *Joseph*, 469 F.3d at 455, Apx. at 22a. This is incorrect. The Sixth Circuit's interpretation is plainly supported in the requirement that the defendant be shown to be the "actual killer."[1] More specifically, the Sixth Circuit rightly cites to *State v. Taylor*, 66 Ohio St. 3d 295, 612 N.E. 2d 316 (1993), in support of this proposition.

In *Taylor*, the Ohio Supreme Court overturned the defendant's conviction on the same principal offender specification at issue here where the State failed to put the issue to the jury and where "there [was] no evidence that [Taylor] was the principal." 612 N.E.2d at 325. In finding insufficient evidence, the Ohio Supreme Court highlighted the evidence implicating Taylor's co-defendant and the lack of any "evidence to the contrary." *Id.* The Ohio Supreme

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[1] It would be illogical and unconstitutional to dispense with the required proof because more than one individual is involved, and the Warden cites no cases to support such an exception.

Court then held that "while Taylor can be convicted of aggravated murder...without being the actual killer, but by aiding and abetting the actual killer, that finding cannot be bootstrapped into a finding that he is the principal offender for purposes of receiving the death penalty...." *Id.* Accordingly, *Taylor* supports the Sixth Circuit's reading of Ohio law that in a case with multiple defendants, the principal offender specification required proof that Joseph was the actual killer.

In sum, the Sixth Circuit rightly decided that the Ohio Supreme Court majority opinion unreasonably denied Joseph's insufficiency of the evidence claim.[2] The Sixth Circuit's decision is based on a correct application of federal and state law to the facts. In any event, none of this states a valid reason why this Court should revisit this case.

B. THE SIXTH CIRCUIT PROPERLY HELD JOSEPH'S DEATH SENTENCE VIOLATED THE EIGHTH AMENDMENT'S NARROWING REQUIREMENT.

Because Joseph was not charged or tried pursuant to a correct capital specification, his death sentence violated his rights under the Eighth Amendment. The Sixth Circuit's decision affirming the District Court's grant of the writ on this claim correctly stated and applied the law, and no compelling reason exists to grant the Warden's petition for a writ of certiorari.

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[2] Three Ohio Supreme Court justices, including the Chief Justice, also found the evidence insufficient to convict Joseph of the capital specification.

The Warden now challenges this decision to a limited degree. In the Sixth Circuit, however, the Warden argued only that the Eighth Amendment claim was procedurally defaulted, and never challenged the District Court's decision on the merits. This Court has repeatedly declined to address arguments not raised in the appellate court. *See, e.g., U.S. v. Bean*, 537 U.S. 71, 74 n.2 (2002) ("That claim, however, is waived, as respondent raised it for the first time in his brief on the merits to this Court."); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999) ("Respondent advanced this argument for the first time in his Brief in Opposition to Certiorari in this Court . . . having failed to raise it before either the BIA or the Court of Appeals. We decline to address the argument at this late stage."). And while the Sixth Circuit chose to address the substance of the Eighth Amendment issue, the Warden's complaints with that decision should be viewed in the context that the Sixth Circuit did not need to even address the issue on the merits.

In any event, the Warden raises no important issue as to the merits of the Eighth Amendment claim. The Warden does not contend that the Sixth Circuit's decision conflicts with any decisions of this Court or with any decisions of other federal courts of appeals. The Warden does contend that "the Sixth Circuit relied *solely* on its prior decision in *Esparza v. Mitchell*," and suggests that the Sixth Circuit did not base its Eighth Amendment claim on clearly established law. Petition at 13 (emphasis added). This is not accurate.

The Sixth Circuit began its analysis with an extensive quote from *Lowenfield v. Phelps*, 484 U.S. 231 (1988), which summarizes the Eighth Amendment's narrowing requirement. *See Joseph v. Coyle*, 469 F.3d at 457, Apx. at 25a. Specifically, the Sixth Circuit recognized this Court's clearly established Eighth Amendment requirement that "a

capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Id.* (quoting *Lowenfield*, 484 U.S. at 244 (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983))). The Sixth Circuit further noted that "'statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.'" *Id.* (quoting *Lowenfield*, 484 U.S. at 244 (quoting *Zant*, 462 U.S. at 878)).

The Warden's suggestion that the Sixth Circuit did not rely upon clearly established law is thus unfounded. The Sixth Circuit correctly applied the principles of *Lowenfield* and *Zant* to affirm the District Court. The Warden offers no argument to the contrary. The Warden does cite to Justice Scalia's concurrence in *Ring v. Arizona*, 536 U.S. 584, 612 (2002), but that decision does not support that the result in this case is somehow not clearly established in the decisions of this Court. In *Ring*, Justice Scalia explicitly stated that "wherever [aggravating] factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 612 (Scalia, J., concurring). That did not happen in this case. The gross error in this case relieved the jury of finding beyond a reasonable doubt an essential element of the capital offense. This essential element – whether the defendant actually killed the victim – obviously functions to narrow the class of persons subject to execution.

Nor does the Warden demonstrate that the Sixth Circuit improperly – any more than it "solely" – relied upon its decision in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002),

rev'd and remanded, *Mitchell v. Esparza*, 540 U.S. 12 (2003). In *Esparza*, the Sixth Circuit granted relief because the State failed to charge and try to the jury the same principal offender specification at issue here. The court held that such an error is not subject to harmless error review. As the Sixth Circuit recognized in this case, this Court reversed the Sixth Circuit's decision in *Esparza* because an Eighth Amendment violation is subject to harmless error analysis. The Sixth Circuit decision in this case correctly notes that "[t]he Supreme Court did not disturb our conclusion that a constitutional violation occurred." *Joseph*, 469 F.3d at 458, Apx. at 27a. The Warden disputes that reading, arguing that a single sentence about the Sixth Circuit failing to cite or apply 28 U.S.C. § 2254(d) equates to a failure to find an Eighth Amendment violation. Read in context, this Court's reference to the requirements of § 2254(d) relates only to the harmless error issue. *Esparza*, 540 U.S. at 15-16. It is clear from the opinion that this Court agreed with the Sixth Circuit, or at a minimum did not question, that a constitutional violation had occurred. *See id.* at 16-17 ("We cannot say that because *the violation* occurred in the context of a capital sentencing proceeding that our precedent requires the opposite result [preclusion of harmless error review].") (emphasis added).

Moreover, in addition to referencing its own opinion, the Sixth Circuit correctly read and properly relied upon this Court's holding in *Mitchell v. Esparza*, 540 U.S. 12, to affirm relief in this case. While this Court found the failure to charge and try the principal offender specification in *Esparza* to be harmless, this Court's reasoning demonstrates that the violation in this case was indeed harmful. In finding the violation harmless in *Esparza*, this Court relied exclusively on the fact that only Esparza was indicted for the crime and that there was no evidence of anyone else's participation in

the murder.[3] As this Court stated, "[A]fter all [Esparza] was the only defendant ~~charged~~ in the indictment. There was no evidence presented that anyone other than respondent was involved in the crime or present at the store." 540 U.S. at 18. In this case, where the State theorized that Bulerin and Joseph were involved in the murder and offered evidence to implicate both, the failure to charge and properly try to the jury the issue of who was the principal offender ("actual killer") was not harmless error. The Sixth Circuit therefore rightly relied upon this Court's reasoning in *Mitchell v. Esparza* in finding that the violation was indeed harmful.

Accordingly, because the Warden identifies no colorable legal error, this Court should deny the Warden's petition for a writ of certiorari on this claim.[4]

C. THE SIXTH CIRCUIT PROPERLY HELD JOSEPH'S TRIAL COUNSEL WAS INEFFECTIVE, CONSTITUTING CAUSE AND PREJUDICE TO EXCUSE ANY PROCEDURAL DEFAULT.

The Sixth Circuit correctly stated and applied *Strickland v. Washington*, 466 U.S. 668 (1984), in unanimously holding that trial counsel's failure both to understand the elements of the offense with which the State intended to charge Joseph and to hold the State to charging and proving those elements

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[3] This Court expressly declined to consider new "evidence brought to light for the first time in the habeas proceeding in the District Court that suggested there might have been another participant in the crime." *Esparza*, 540 U.S. at 18 n.3.

[4] In addition, the Warden's challenge to the Eighth Amendment finding is not even outcome determinative for this case. Joseph also challenged the defective indictment on due process grounds, and the Warden does not challenge the grant of relief on that basis.

caused any alleged procedural default and prejudiced the outcome of Joseph's proceedings.[5] Once again, by arguing that the Sixth Circuit merely reached the wrong decision, the Warden does not identify a single issue that could have any bearing on future cases. As there is no error to correct and no question of larger public importance, this Court should deny the Warden's petition on this basis.

The Warden does not contest the Sixth Circuit's conclusion that ineffective assistance of counsel constitutes cause and prejudice to excuse a procedural default.[6] The Warden also does not dispute that trial counsel performed deficiently in failing to even understand the statutory capital specification that should have determined whether his client lived or died. The Warden's argument rests entirely on the Sixth Circuit's application of the *Strickland* prejudice prong to the particular circumstances of this case.

Relying on *Strickland*, the Sixth Circuit explained that the prejudice component requires the defendant to "show 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Joseph v. Coyle*, 469 F.3d at 459 (quoting *Strickland*, 466 U.S. at 694), Apx. at 29a-30a. It further explained that "[a] reasonable probability is less than

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[5] The District Court also found that trial counsel's ineffective assistance amounted to cause and prejudice. Apx. at 151-54.

[6] *See Joseph*, 469 F.3d at 459 (noting that *Murray v. Carrier*, 477 U.S. 478 (1986), and *Edwards v. Carpenter*, 529 U.S. 446 (2000), hold ineffective assistance of counsel constitutes cause for a procedural default), Apx. at 28a; *id.* at 462 (relying on *Banks v. Dretke*, 540 U.S. 668, 691, 698 (2004), *Strickler v. Greene*, 527 U.S. 263, 282 (1999), *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), and *Strickland*, 466 U.S. at 694, in holding that proving the prejudice prong of *Strickland* establishes the prejudice prong of cause and prejudice), Apx. 34a-35a.

a preponderance of the evidence, as 'a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. . . . Instead, '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 693-94), Apx. at 30a.

The Sixth Circuit found the prejudice inquiry "straightforward." *Id.* at 462, Apx. 33a. Without question, a reasonable probability exists that the result of the *Joseph* proceedings would have been different if counsel had understood the elements of the capital specification under which Joseph was ultimately sentenced to die. If defense counsel had held the State to proving the elements of the valid specification (that Joseph was "the actual killer"), there is a more than reasonable probability that the jury would have acquitted Joseph of the specification. After all, the State repeatedly admitted that it did not know, much less could prove who actually killed the victim. *See, e.g.*, 11 J.A. at 3907 (Trial Tr. at 1976); 11 J.A. at 3973 (Trial Tr. at 2042). And, there is at least a reasonable probability that had defense counsel informed the court of the law's true requirements, the trial judge would have set aside the verdict or rejected the jury's recommendation.

The Warden primarily takes issue with the Sixth Circuit's decision because he believes the court "ignored" what the Warden characterizes as "the pivotal, factual findings of the Supreme Court of Ohio relevant to the possible effect of the defective specification and the corresponding jury instructions." Petition at 17. The Warden's argument fails for at least three reasons.[7]

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[7] Of course, to the extent the Warden implies any state court determination that Joseph was not prejudiced is a "factual finding," that is

First, the Ohio Supreme Court did not address Joseph's ineffective assistance claim. The portion of the opinion to which the Warden refers is the court's plain error analysis of Joseph's defective indictment claim. The plain error standard is a much higher standard than *Strickland's* prejudice prong – plain error requires the defendant to show that but for the error the outcome *would have been* different, not simply a reasonable probability of a different outcome. *State v. Joseph*, 73 Ohio St. 3d 450, 457 (1995).

Second, the Ohio Court of Appeals, the last state court to issue a reasoned opinion on Joseph's ineffective assistance claim, did *not* rely on the underlying facts the Warden cites – that the jury form correctly stated the capital specification, that the trial court read the correct language to the jury, and that the jurors signed the verdict form. Petition at 17. It did not cite a single one of these facts in its analysis of Joseph's ineffective assistance of counsel claim and, in fact, did not even address the prejudice prong with respect to counsel's failure to object to the indictment.[8] *State v. Joseph*, 1993 WL 531858, at *26 (Dec. 23, 1993). As the Sixth Circuit correctly recognized, under *Wiggins v. Smith*, a federal habeas court's "'review is not circumscribed by a state court

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incorrect. As this Court noted in *Strickland*, "a state court conclusion that counsel rendered effective assistance [i.e., that counsel's performance was not deficient and/or did not prejudice the defendant], is not a finding of fact binding on the federal court." 466 U.S. at 698.

[8] In analyzing Joseph's erroneous jury instruction claim, the Ohio Court of Appeals did mention that the trial court read the verdict form with the correct specification to the jury and that the jury signed the verdict form. *State v. Joseph*, 1993 WL 531858, at **13-14. Like the Ohio Supreme Court, however, it addressed these facts in the course of a plain error analysis. *Id.* In any event, it did not rely on either fact in its fleeting analysis of the prejudice prong of Joseph's ineffective assistance of counsel claim.

conclusion with respect to prejudice'" where the state court did not reach this prong of the analysis. *Joseph v. Coyle*, 469 F.3d at 460 n.14 (quoting *Wiggins*, 539 U.S. 510, 534 (2003)), Apx. at 30a-31a.[9]

Third, and perhaps most importantly, the Sixth Circuit did not ignore these facts. To the contrary, it acknowledged that "the [trial] court once read from the verdict form, which included a correct version of the specification." *Id.* at 452, Apx. at 17a. Nevertheless, considering the context of this entire case – from the charging document through the close of the mitigation phase – the finding of prejudice is the only reasonable decision.

The Sixth Circuit accurately relied on the following unassailable facts in the guilt phase of Joseph's trial in concluding that trial counsel's failure to understand the specification prejudiced Joseph: (1) the indictment did not charge that Joseph was the principal offender in the aggravated murder, *id.* at 451, Apx. at 14a-15a; (2) the State told the jury several times in its opening statement and rebuttal that the capital specification was the kidnapping, *id.*, Apx. at 15a-16a; (3) the State admitted that it could not prove Joseph was the actual killer, *id.* at 452, Apx. at 16a; (4) in closing, the State wrongly told the jury that this shortcoming did not matter, *id.*; (5) the court incorrectly instructed the jury that the specification required that Joseph be the principal offender in the commission of the kidnapping and several times referred to the specification "in the indictment," *id.*, Apx. at 17a; and (6) the court never instructed the jury that the principal offender provision of the specification requires the State to prove the defendant actually killed the victim, *id.*

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[9] Regardless, Joseph's claim succeeds under AEDPA review. *Joseph*, 469 F.3d at 460 n.14, Apx. 31a.

The Sixth Circuit also relied on the following facts from the mitigation phase: (1) the trial court again referred to the specification as the kidnapping, *id.* at 453, Apx. at 18a; (2) the State equated the aggravating circumstance with the kidnapping in its closing and rebuttal arguments, *id.*; (3) in its instructions, the court referred to the specification "in the indictment" and "consistently used some version of the phrase 'the aggravating circumstance which the defendant was found guilty of committing," which was also used in the verdict form, thereby incorporating the erroneous version into the instructions and verdict form, *id.*; (4) Joseph's counsel referred to the specification as the kidnapping three times in his opening argument and twice in closing, *id.*, Apx. at 18a-19a; and (5) during the trial court's independent review, both Joseph's counsel and the trial court referred to the aggravating circumstance of kidnapping, *id.*, Apx. at 19a.

The Warden acknowledges that "[i]t is possible that the jury might have found that Joseph was not a principal offender in the aggravated murder, had the instructions on this point been clearer." Petition at 18. Still, he fights to uphold the verdict, arguing that this is not a case "dependent on the jurors' interpretation of ambiguous instructions." *Id.* The Warden is correct that this is not a case where the jurors were required to interpret an ambiguous instruction – a verdict in a case like that would be worthy of *more* confidence than the verdict the Warden is asking this Court to uphold. Here, the Warden's argument is dependent on the jurors knowing that the offense for which Joseph was sentenced to die required the State to prove he was the actual killer, when the court never gave them such an instruction and the State told the jury it was not required to prove that. 11 J.A. at 3973 (Trial Tr. at 2042). It is inconceivable that the jury somehow divined that the law required it to find the

capital specification even though the State, the defense counsel, and the trial court did not know what the law required. The jury's verdict, despite the absence of any proof as to who was the actual killer, only reinforces that it did not understand the State's burden.

In sum, Richard Joseph's trial counsel failed to object at any of the many points where the State and the trial court misinstructed the jury as to the law's requirements. Indeed, counsel exacerbated the error through his own arguments. Nor did trial counsel insist that the jury be instructed that "principal offender" under Ohio law means the "actual killer." Moreover, counsel did not make the simple dispositive argument that, as even the State did not know who actually killed the victim, Richard Joseph could not be convicted of the capital specification. In short, counsel's ignorance of the law relieved the State of proving the capital crime, and allowed his client to be sentenced to death for a charge never fairly presented to the jury. Prejudice is undeniable, and a contrary finding would be plainly unreasonable.

In any event, these arguments relate only to the facts of this particular case and present no unresolved issue of greater importance. Even if this Court were inclined to take cases where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law, the decision in this case is clearly correct. For these reasons, the Court should deny the State's petition on this basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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